

**David Ng Pak Shing and Others** - - - - - *Appellants*

v.

**Lee Ing Chee, also known as Lee Hai Hock, and Others** - *Respondents*

FROM

**THE COURT OF APPEAL OF HONG KONG**

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 20TH APRIL 1982**

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*Present at the Hearing:*

LORD FRASER OF TULLYBELTON  
LORD ELWYN-JONES  
LORD RUSSELL OF KILLOWEN  
LORD ROSKILL  
LORD BRIDGE OF HARWICH

[*Delivered by* LORD FRASER OF TULLYBELTON]

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This is an appeal from the Court of Appeal of Hong Kong (Briggs C.J., Huggins and Pickering J.J.A.) in three actions which were heard together. Two of the actions, those in which the first and second respondents respectively were the plaintiffs, were consolidated before the hearing by the trial judge. The third action, although not consolidated with the others, was heard with them. The plaintiffs in all three actions, the respondents in this appeal, are creditors of the first defendant, Choo Kim San ("C.K. San"). He is not a party to the appeal. They obtained charging orders nisi in Hong Kong over certain shares in a company called San Imperial Corporation Limited ("San Imperial"), registered in Hong Kong, on the basis of averments that the shares, which were registered in the names of various nominee companies, were at the dates of the charging orders beneficially owned by C.K. San. The charging orders nisi obtained in the actions by the first and second respondents were dated 15th July 1977. The charging orders nisi obtained by the third respondent were dated 7th September 1977. On the same dates the respondents also obtained garnishee orders nisi against the first, second and third appellants for sums of money owed by them as the price of certain of the shares to persons who were said to be nominees of C.K. San.

The appellants deny that C.K. San was the beneficial owner of the shares in question on these dates. They claim that the beneficial interest had been acquired partly by the first, second and third appellants jointly as a syndicate ("the Syndicate"), and partly by the first appellant, as an individual, by 29th March 1977 at latest, that is more than three months before any of the orders were made. As regards the majority of the shares in question, a block of 15,000,000 shares in San Imperial, the appellants' case is that the Syndicate acquired the beneficial interest by a somewhat

complicated transaction which was completed on 28th March 1977. They originally maintained that the vendors from whom they purchased it were persons independent of C.K. San, but the trial judge (Yang J.) held, and the appellants now accept for the purposes of this appeal, that the vendors were nominees or agents of C.K. San and that, immediately before the transaction completed on 28th March 1977, the beneficial interest in the 15,000,000 shares had been vested in C.K. San. The appellants' present position is that, whoever the owner of the beneficial interest may have been before that transaction, they (the appellants) acquired that interest as a result of the transaction. The controversy on this part of the case centres on the respondents' allegation that the transaction completed on 28th March was a sham and was not effective to pass the beneficial interest in the 15,000,000 shares to the first three appellants from C.K. San. The only issue in the appeal concerning the 15,000,000 shares therefore is whether C.K. San was the beneficial owner of the shares on 15th July 1977 or not.

The judge made absolute the charging order nisi on the 15,000,000 shares. He discharged the garnishee order nisi in respect of an unpaid balance of the price of these shares, on the ground that the transaction completed on 28th March had been a sham and created no debt. The Court of Appeal discharged the charging order on the shares but (perhaps surprisingly) made no order in respect of the balance of the price.

There is a separate, but related, controversy in respect of another block of 2,164,200 shares in San Imperial which, according to the appellants, were acquired beneficially by the first appellant as an individual during March 1977. The respondents' contention is that that transaction also was a sham.

The judge discharged the charging order nisi in respect of *inter alia* this block of shares, but he made absolute the garnishee order nisi, so far as it referred to the unpaid balance of the price for which Ng had re-sold the shares. The unpaid balance amounted to HK\$2,813,300. The Court of Appeal agreed with the judge's decision on this part of the case and ordered that the sum of HK\$2,813,300 (which had been deposited in court) be paid over to the third respondent. The price has been paid over accordingly. The appellant Ng now asks for an order that it be repaid to him by the third respondent.

Before entering upon the particulars of the appeal their Lordships must refer to an important feature of the proceedings below. The case for the respondents has all along been that the transactions whereby the appellants purported to acquire the shares in question were shams, the only purpose of which was to deceive C.K. San's creditors by pretending that he had parted with his interest in the shares, while in reality he retained it. The first and second respondents alleged that the appellants acted throughout as nominees, or more accurately as agents, of C.K. San who retained the beneficial interest in the shares. The third respondent alleges that the appellants had conspired with other persons to defraud the creditors of C.K. San. All parties to the proceedings, and the courts in Hong Kong, have treated the allegations of conspiracy and of nominee-ship (or agency) as meaning the same thing for the purposes of this case, although Counsel for the first and second respondents did not formally adopt the allegation of conspiracy. Their Lordships accept the submission, made in the printed Case for the third respondent (paragraph 13) that "there is no useful distinction to be drawn on the facts of the present case between [the third respondent's] allegation of conspiracy and the [first and second respondents'] allegation of nominee-ship". The allegation of conspiracy on which the respondents relied is made in the Statement of Claim for the third respondent at paragraph 7. The terms of the allegation will be considered more fully below. For the present their Lordships observe that in the submission to

the courts in Hong Kong very little attention seems to have been paid to the pleadings. This was partly because of the short periods of time allowed(1) for serving the Defence and Counter-Claim (in the consolidated actions by the first and second respondents only 11 days from 23rd August to 3rd September 1977) and (2) between the dates by which mutual discovery was ordered to take place (22nd September 1977 in the consolidated actions and 6th October in the action by the third respondent) and the beginning of the hearing before the judge (10th October 1977). There may have been good reasons for pressing on with the hearing, particularly as the proceedings were mainly directed to making absolute certain of the orders nisi previously granted. But full discovery was not made by the appointed dates, and it became apparent in the course of the hearing, and as further discovery was gradually made, that the cases made by the respondents in evidence differed substantially from the cases as pleaded. Instead of ordering the pleadings to be amended so as to set out the parties' final positions, as they had emerged by the end of the hearing, which was a very long one (lasting about fifty days), the learned judge accepted a suggestion, which had been agreed on by Counsel for all parties, that they were not to be bound by their respective pleadings but that "each party must not go beyond the broad concepts of his own pleadings". Before the Court of Appeal the hearing took place on the same basis. Whether such an agreement could ever be desirable their Lordships need not now consider. Certainly in the present proceedings, where the basis of the respondents' (plaintiffs') case was conspiracy and sham, their Lordships must record their emphatic disapproval of such laxity. Sham and conspiracy are serious matters and it is unfortunate that the pleadings were not amended to show the exact nature of the alleged sham or conspiracy at least before the hearing in the Court of Appeal. The omission to do so in the present case has materially increased the difficulties both for the trial judge and for the appellate tribunals, including the Board. Their Lordships refer to the speech of Lord Radcliffe in *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] A.C. 218, 241.

The facts which give rise to these proceedings are complicated and it is by no means certain that they have been fully explicated at the trial. Unfortunately it is necessary to refer to them in some detail in order to understand the issues. The story begins in June 1976 when C.K. San was arrested in Hong Kong on charges of fraud. At that time the issued share capital of San Imperial was 48.2 million HK\$1 shares, of which C.K. San was the beneficial owner of about 20,000,000 shares. His shares were almost all registered in the names of two holding companies controlled by him, called Asiatic Nominees Limited and Triumphant Nominees Limited. He was the largest shareholder in, and had effective control of, San Imperial. After his arrest, he was released on bail, but he failed to surrender to his bail on 28th October 1976, having left Hong Kong and gone to Taiwan. For the ensuing events it is convenient to set out first the account relied upon by the appellants. Early in November 1976, according to the appellants, a substantial Hong Kong business man named James Coe, who had heard of C.K. San's failure to appear in court, approached the second appellant and asked if he (the second appellant) knew whether Coe might be able to acquire a controlling interest in San Imperial. A few days later he also approached the third appellant on the same matter. The second appellant ("Ives") is a solicitor in Hong Kong and had acted both for and against C.K. San on various occasions, but he was not a close business associate of C.K. San. The third appellant ("Ho Chapman") is an established businessman in Hong Kong, possessed of considerable means. Ives and Ho Chapman were friends and business associates. They discussed the enquiry from James Coe and decided to enlist the help of the first appellant ("Ng"). He is a stockbroker in Hong Kong, younger and more physically active than Ho Chapman. He was expected to (and did) do most of the

active work of finding the owners of shares in San Imperial to make up a controlling interest. These three appellants formed a syndicate with the object of putting together a sufficient number of shares to constitute an effective controlling interest, (originally put at 24 million, later reduced to 23 million) and selling them at a profit to James Coe or to anyone else who would pay a better price. This is exactly what they say they achieved. If they are right, they made a profit of some HK\$21,000,000. The respondents contend that the whole account of these events given by the appellants is untrue, and that the appellants acted merely as agents for C.K. San, helping him to disguise his ownership of the shares and to dispose of them in such a way that he received the proceeds for himself to the prejudice of his creditors. So long as C.K. San remains in Taiwan, which has no extradition treaty with Hong Kong and where civil proceedings apparently cannot be taken against him by persons in Hong Kong or Malaysia, he will be out of reach of his creditors, including the respondents.

Continuing with the appellants' version of events, they say that, having formed the Syndicate for the purpose already mentioned, they were confronted with three difficulties—

1. Where was C.K. San to be found?
2. Was it lawful to deal with him when he was a fugitive from justice?
3. Had C.K. San diminished or misappropriated San Imperial's assets while he was in control of it?

The first difficulty was quickly disposed of. Ng first tried to find C.K. San in Bangkok, but without success. He then went to Taiwan on 30th December 1976. Next day he met C.K. San by chance in the hotel in Taipei where both of them happened to be staying. Ng said it was the hotel where most foreign visitors stayed. The learned judge commented that the "coincidence" of their having stayed at the same hotel and met so quickly was "remarkable" and he mentioned it as one reason for disbelieving Ng's evidence. The judge's main reason for that view was that he would have thought that C.K. San "who was heavily in debt and a fugitive from justice, would have avoided going to public places". But as there was no extradition treaty and no diplomatic relations between Taiwan and Hong Kong there seems to be no reason why C.K. San should not appear in public in Taiwan. The Court of Appeal regarded the "coincidence" as no more than a straw in the wind, against the truthfulness of Ng's evidence. Their Lordships are unable to accord to it the weight even of a straw, in the absence of any evidence that the meeting was *not* a coincidence, or of the number of hotels in Taipei in which a foreigner like C.K. San would have been likely to stay.

In any event at the meeting on 31st December 1976 C.K. San told Ng that he had already sold 15,000,000 of his shares in San Imperial to a Taiwanese couple, Chow Chaw-I and his wife Hwang Shang Pai ("the Chows"), and he arranged for Ng to meet them later that day. Ng then began negotiations with the Chows for the purchase of their 15,000,000 shares. Ng returned to Hong Kong on 1st January 1977 and on 3rd January he told Ives and Ho that he had found C.K. San and thought the Syndicate was "in business". Negotiations with the Chows lasted for about three months and involved Ng paying altogether six visits to Taiwan. The negotiations were eventually concluded by a written agreement dated 23rd March 1977 whereby the Syndicate in effect acquired the 15,000,000 shares from the Chows at a price of HKc60 each.

Much time was taken up at the hearing before the judge with the question of whether the Chows had acquired the beneficial interest in the 15,000,000 shares from C.K. San (as the appellants contended) and were acting as

principals in selling their interest to the Syndicate, or whether (as the respondents contended) the Chows acted throughout merely as nominees of C.K. San. The judge found that the Chows were nominees of C.K. San and, for the purposes of this appeal, the appellants are accepting that finding. But it does not go far towards solving the vital question which is whether the Syndicate were nominees of C.K. San.

The second difficulty with which the appellants say the Syndicate was faced was whether they could legally deal with C.K. San. That was disposed of by Ives, the solicitor member of the Syndicate, obtaining an opinion from counsel in London by telex. The telex requesting the opinion was dictated by Ives on 3rd January 1977 but, owing to difficulty in getting a line to London, was not despatched until 4th January 1977. Counsel's advice, sent with commendable speed by telex on 5th January, was that "if client's sole motive is the commercial one of buying the shares for himself" as distinct from financing or assisting a fugitive, then the client (purchaser) would not be accessory to any offence by C.K. San. The judge drew from Ives' telex several inferences against the appellants, but for the reasons explained in the Court of Appeal by Huggins J.A. their Lordships consider that these inferences were unjustified. The terms of Ives' telex are perfectly consistent with the appellants' version of events, and, if that version is true, counsel's advice gave the green light for the Syndicate to proceed with the acquisition of C.K. San's shares.

The third difficulty, whether C.K. San had depleted San Imperial's assets, did not loom large in the evidence and the Syndicate apparently satisfied themselves that he had not done so.

According to the appellants the final chapter of the story was that they picked up a total of just under 23,000,000 shares, including two parcels acquired by Ng as an individual, and sold them to James Coe at a handsome profit. No allegation of conspiracy was made against James Coe by the third respondent. But the first and second respondents alleged in their amended Statement of Claim served on 23rd August 1977 that the 15,000,000 shares were "still" beneficially owned by C.K. San, and that allegation necessarily implies that James Coe also was a nominee of C.K. San. The judge found that there was no evidence of deceit or intention to mislead on the part of James Coe and thus in effect found that the sale by the Syndicate to James Coe was genuine. In their Lordships' opinion, that must be right even if the respondents' version of the story is accepted; otherwise there would have been no genuine sale and purchase of C.K. San's shares, and consequently no proceeds available to pay to him. The alleged conspiracy would thus have failed in its purpose.

The respondents put forward a directly contradictory version of events alleging conspiracy and sham as already mentioned. According to the respondents not only the Chows but also the Syndicate acted throughout as C.K. San's nominees or agents, and the only reason for the elaborate procedure was to conceal the interest of C.K. San from his creditors.

The judge correctly stated the issues that he had to decide thus:

- "(1) Whether on the dates that the charging orders nisi were made C.K. San had already divested himself of his beneficial interests (if any) in any or all of the San Imperial shares referred to above, and
- (2) If so, whether the purchase prices for any of the shares were in fact payable to C.K. San. The burden is of course on the plaintiffs to prove their case."

He answered the first question in the negative, that is in favour of the respondents. Consequently his answer to the second question was in the affirmative. In stating his reasons the judge began with a finding that Ng and Ives were untruthful witnesses. His finding to that effect of course tends to show that their version of the events is not true, but it does not establish that the respondents' version is true. Nevertheless their Lordships fully recognise that the judge's finding on credibility constitutes a substantial obstacle to the appellants' success in the appeal.

Their Lordships have already mentioned two particular points (the "remarkable" coincidence of Ng's meeting with C.K. San and counsel's advice by telex) on which the judge drew conclusions adverse to the appellants' credibility, but on which, for the reasons already explained, they consider that the inference was unjustified. The judge's reasons for finding that the appellants' evidence was untruthful were considered in detail by Huggins J.A. in the Court of Appeal, who showed that each of the reasons was either erroneous or gave too much weight to small matters. Their Lordships agree with Huggins J.A. and they do not accept the judge's reasons for disbelieving Ng and Ives. It is true that the learned judge said that his list of reasons were not exhaustive, but no additional reasons have been suggested by anyone except Pickering J.A. in the Court of Appeal who thought that the delay in making discovery of certain records referred to as "the blue card" was a factor tending to discredit Ng. The judge, who was aware of the blue card episode, did not draw from it any inference unfavourable to Ng and their Lordships are satisfied that he was right not to do so. The delay may indicate that C.K. San and an employee of his named Ho Chung Po, who was in charge of the blue card, may have had something to conceal but it does not justify an inference against Ng or Ives who were not in control of the blue card.

Two other matters bearing on credibility should be mentioned. First, it was submitted that unless the appellants were seeking to protect C.K. San there was no reason why they should have argued vigorously, as they did in the courts below, that the Chows were acting as principals and not as C.K. San's agents. But their Lordships consider that this submission is largely answered by the evidence of Ives to the effect that he was originally doubtful whether the Chows were principals or not, but that he eventually concluded that they were principals. His conclusion may have been erroneous but, if it had been reached after serious consideration, it seems not unreasonable that he should have maintained it in his evidence. An additional reason of course is that the Syndicate were concerned to make no admission that the Chows were other than principals lest by doing so they should lose the protection of the garnishee order.

The second point is that, although the Chows were made defendants in the actions, they did not enter an appearance or take any part in the actions, nor did they appear as witnesses. In ordinary circumstances their failure to give evidence might have been a matter of considerable significance. But in the present case their absence was explained on the ground that as citizens of Taiwan it was illegal for them to own shares in a company in Hong Kong and that they would be liable to heavy penalties for doing so. In these circumstances their absence is readily explicable and their Lordships do not consider that any inference adverse to the appellants can properly be drawn from it.

Apart from the specific matters mentioned by the judge as reasons for disbelieving Ng and Ives he did of course have the great advantage of seeing each of them in the witness box for several days, an advantage which is necessarily denied to an appellate court. Their Lordships have fully in view the warnings repeatedly given to appellate courts against reversing the findings of a trial judge on credibility (see *Thomas v. Thomas* 1947 S.C.

(H.L.) 45; *sub nomine Watt or Thomas v. Thomas* [1947] A.C. 484 and *Onassis and Calogeropoulos v. Vergottis* [1968] 2 Lloyd's Rep. 403). In the present case the importance of this point is somewhat diminished because it appears that the learned judge's opinion on credibility was probably affected by the demeanour of these witnesses under a cross-examination which, their Lordships regret to notice, strayed well beyond the proper limits. For example, Ives was cross-examined at great length on the construction of an agreement drafted by him whereby the Syndicate sold the shares in San Imperial to James Coe's nominee company and he was eventually induced to say that the construction he had put upon the agreement at the beginning of his evidence was wrong. It was strongly suggested to him that he had known all along that his construction was wrong and that he had deliberately persisted in it. In fact, as the Court of Appeal rightly held, his original construction of the agreement was correct, but the significance of the matter is that he was made to appear deceitful by being cross-examined on a question of law, in spite of a protest by his counsel, on which his opinion ought never to have been asked. In the case of Ng he was subjected to abuse (one "question" consisted of the statement "Mr. Ng, you are the most dreadful and most awful liar") which, in spite of another protest by his counsel, was not withdrawn by the cross-examiner nor checked by the Court.

In all the circumstances their Lordships feel at liberty to differ from the learned judge's findings on credibility and to rely, as the learned judge himself said that he would do, mainly on documentary or undisputed evidence.

The particular document on which the judge mainly relied was the agreement dated 23rd March 1977 ("the Fermay agreement") by which the Syndicate claimed to have in effect obtained beneficial interest in the 15,000,000 San Imperial shares. It was part of a complicated arrangement, and the judge's view briefly was that the arrangement was so unnecessarily complicated, and contained such inexplicable elements, that it could not have been genuinely intended to pass the beneficial interest to the Syndicate. The arrangements accompanying the agreement were set in train on or about 5th March 1977, as soon as the Chows had agreed with Ng to sell their 15,000,000 shares at a price of HKc60 each. The judge considered that price to be absurdly low for a block of shares that would go a long way towards making up a controlling interest of 23,000,000 shares, and might even, by itself, be enough to give effective control of the company. The market price in Hong Kong for shares in San Imperial not carrying control was approximately HKc20. Having regard to the predicament in which C.K. San was placed as a fugitive, their Lordships are unable to agree that 60 cents was an unrealistically low price for his holding. The transaction was not carried out by a straight sale and purchase, but the Syndicate set up a nominee company called Fermay Company Limited ("Fermay") to hold the 15,000,000 shares in San Imperial. The whole share capital of Fermay, amounting to 9,000,000 shares of HK\$1 each, was to be allocated to the Chows in exchange for the 15,000,000 San Imperial Shares. On 23rd March during Ng's sixth and final visit to Taiwan, he obtained the signatures of the Chows to the Fermay agreement an essential condition of which was (clause 3) that Fermay should be registered as the holder of 15,000,000 San Imperial shares. Those 15,000,000 shares were the only asset of Fermay. The Chows undertook that, within 90 days from the date of such registration, they would deliver to the Syndicate transfers signed by them in blank together with the relative certificates for the whole 9,000,000 shares in Fermay. On the same day (23rd March 1977) the subscribers to the memorandum of association of Fermay in Hong Kong appointed the Chows as the first directors of Fermay, and the Chows, at a Directors' meeting in Taiwan, resolved that the members of the Syndicate or any one of them should be authorised signatories for Fermay for the

purpose of entering into any contract on behalf of the company. On or about 13th May 1977 the Chows signed an undated letter resigning office as Directors of Fermay and handed it to Ng. They also appointed Ng Managing Director of Fermay. The purchase price of the Fermay shares to be paid by the Syndicate was agreed to be HK\$9,000,000 (equivalent to HKc60 each for the 15,000,000 shares in San Imperial) of which HK\$200,000 was to be paid on the date of the agreement as a deposit, leaving the balance of HK\$8.8m. to be paid on completion. From the deposit of HK\$200,000 there would fall to be paid the stamp duty on the transfer of the Fermay shares and capital duty on the company's capital, leaving only about HK\$92,000 for the Chows.

The learned judge thought, rightly in their Lordships' view, that the effect of the Fermay agreement, and of the various resolutions and documents associated with it and just mentioned, was that the Chows relinquished their control of Fermay. But he found it impossible to believe that they had done so for the payment of only HK\$200,000, or in effect HK\$92,000. He was also much influenced by clause 4 of the agreement. That clause has been the focus of much argument, and it has, in the opinion of their Lordships, been misconstrued by the learned judges in Hong Kong. Clause 4 provided *inter alia* as follows:

“ 4. . . . On completion the Vendors shall deliver to the Purchaser all the necessary transfers duly signed by the Vendors in blank together with their respective certificates for the Fermay shares against payment of the balance of the purchase price. Delivery of the Fermay shares and transfers to the Purchaser shall be proof of payment of the balance of the purchase price and the Vendor shall be estopped from denying payment after delivery.”

The judge thought that the effect of that clause was that the Chows would, in any event, be estopped from claiming the balance of the purchase price amounting to HK\$8.8m. He concluded “ There could be no acceptable reason for [the Chows] to repose such complete trust in the Syndicate ”. The Court of Appeal took the same view of clause 4, and largely for that reason, Pickering J.A. said that the judge's finding just quoted was “ unassailable ”. Huggins J.A. found himself “ unable to say that the judge's errors [in reasoning as to the credibility of witnesses] were such as to invalidate his finding that their explanations of the Fermay agreement were untrue ”.

Their Lordships are, with respect, of opinion that both courts erred in their construction of clause 4. The clause would not, and could not, have prevented the Chows from claiming the balance of HK\$8.8m. if they could prove that it had not in fact been paid to them in exchange for the transfers and certificates contracted for. Accordingly the sinister significance which all the learned judges attributed to clause 4 was in the opinion of their Lordships not justified. Moreover, if the respondents are right in saying that the Syndicate were acting as nominees of C.K. San, he at least would have been reposing even more trust in them than the Chows would have been if the appellants are right.

The Fermay agreement and the whole transaction including the directors' resolution, etc. associated with it, may have been unnecessarily cumbersome but their Lordships are of opinion that they are perfectly consistent with the appellants' version of events. The main reason for using Fermay was that the Syndicate were anxious lest the certificates for the 15,000,000 San Imperial shares might turn out to be forgeries. They were therefore not prepared to pay the main part of the price until the authenticity of the certificates had been established. One way of establishing it was to have the certificates accepted as valid by the Registrar of San Imperial, in the



course of giving effect to the transfers from C.K. San's nominee companies to Fermay. The 15,000,000 shares were in fact registered in name of Fermay on 28th March 1977. No doubt there would have been other ways of establishing the validity of the certificates, and there was evidence that an attempt was made to test them by offering them as security to a bank, but without success. But there was nothing unreasonable in the procedure adopted by the Syndicate of using Fermay. Accordingly their Lordships regard the Fermay agreement as being valid and effective according to its terms, subject to the qualification that the Chows, as vendors, were acting not as principals but as agents for C.K. San.

A remarkable feature of the learned judge's decision is that he expressly found that the third respondent "has not made out a case of conspiracy against the Syndicate as described in paragraph 7 of their Statement of Claim", but that he went on to find that the agreement under which the Syndicate purported to purchase the 15,000,000 shares was a sham. These findings are plainly inconsistent and cannot stand together. The allegation of conspiracy referred to by the judge was, relevantly, as follows:

"... to defraud Choo Kim San's creditors generally the Defendants and each of them together with persons unknown from about October 1976 onwards conspired and combined amongst themselves in Hong Kong and elsewhere to sell or cause to be sold on behalf of Choo Kim San the 15,000,000 shares in the name of Fermay . . ."

and certain other shares with which this appeal is not concerned.

The learned judges of appeal sought to reconcile the judge's findings. Huggins J.A. suggested that the inconsistency could be avoided by reading the finding of no conspiracy as meaning only that the last chapter of the story, the transaction between the Syndicate and James Coe, was innocent and genuine. Their Lordships are, with respect, not able to accept this suggestion. The learned judge expressly "noted that [the third respondent] makes no allegation of conspiracy against Coe, and the implication of [the third respondent's] pleadings is that [Coe's nominee company] was an innocent purchaser". When the judge went on to say "on the evidence I am also of the view that [the third respondent] has not made out a case of conspiracy *against the Syndicate* (emphasis added) as described in paragraph 7 of their Statement of Claim" he must have meant what he said and cannot have been referring to Coe or his nominee company. Moreover Coe had been added as a defendant and was therefore one of those against whom the allegation of conspiracy was directed. Pickering J.A. thought that the judge's finding that the Fermay agreement was a "sham" was unassailable and he interpreted it as a "tacit finding of conspiracy" between the Syndicate and the Chows and C.K. San, but not extending to Coe or his nominee company. For the reasons already explained their Lordships cannot agree; in any event they would be reluctant to accept a "tacit" finding of such a serious, and in this case vital, matter as conspiracy.

The central passage in the judge's reasoning, one of several passages italicised by him, was in the following paragraph:

"In my judgment the 23rd March 1977 agreement was, on credibility as well as probability, a complete sham and nullity. On the facts, I have also drawn the conclusions that

- (1) [The Chows] were acting as C.K. San's nominees at all material times;
- (2) The Syndicate must have known that [the Chows] were C.K. San's nominees;

- (3) All parties knew that the transaction between the Syndicate and [the Chows] were shams, and
- (4) Accordingly the beneficial interests in the shares still remain in C.K. San."

Their Lordships have given the most careful attention to that passage and they have reached the conclusion that it can only be read as meaning that the judge considered that because (1) the Chows were acting as C.K. San's nominees and because (2) the Syndicate must have known that (3) therefore all parties knew that the transaction (*i.e.* the Fermay agreement) between the Syndicate and the Chows was a sham. It is unfortunate that neither in the pleadings nor the judgment is there to be found a definition of what was meant by the word "sham" but, having regard to the numbered clause (4) which begins with the word "accordingly", it seems clear that the judge must have used the word "sham" to mean "not intended to convey the beneficial interest". If, as their Lordships think, that is what he meant, it is clearly a *non sequitur*. Even if the Chows were known by the Syndicate to be acting as C.K. San's nominees or agents, that would not necessarily lead to the inference that his beneficial interest in the shares was not intended to be transferred. One essential question would be whether they had authority to convey his interest; on that question there was no evidence. None of the judges below seems to have considered the question whether the Chows were agents of C.K. San to sell his beneficial interest or whether they were agents, or nominees, of C.K. San merely to empower others (the Syndicate) to sell that interest as his agents, or nominees. The latter alternative seems much the less probable.

The meaning which the learned judge seems to have attributed to "sham" is not its ordinary meaning. The ordinary meaning was explained by Diplock L.J. in *Snook v. London and West Riding Investments Ltd.* [1967] 2 Q.B. 786, 802 where he said sham "means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create".

That explanation was approved by the House of Lords in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1981] 1 All E.R.865, 881. Even if the Fermay agreement was a sham in the sense that the Chows purported to act as principals when they were really agents, it was certainly not a "nullity"; it undoubtedly imposed an obligation on the Chows, in the events stated in the agreement, to transfer the title to the shares, being the title which ultimately devolved on Coe's company.

Their Lordships conclude that the learned judge, who was faced with a truly formidable task at the end of a very long hearing, must have been misled by the emphasis which appears to have been laid on the question whether the Chows were principals or agents, into supposing that that question was of critical importance for the case. In that he erred. If the pleadings had been put into proper order and had received proper attention that error might have been avoided. The learned judge also thought that counsel for the first and second respondents had abandoned his case that the Chows were C.K. San's nominees, but counsel for all parties are agreed, and the Court of Appeal held, that the learned judge had misunderstood the position and that counsel had not abandoned that part of his case. Nevertheless it is surprising that the learned judge found the Fermay agreement to be a sham, in the sense in which he seems to have used that word, notwithstanding the abandonment (as he thought) of the case of nominee-ship as well as finding against conspiracy. On the whole evidence on this part of the case their Lordships are of opinion that it has not been proved

that the Fermay agreement was a sham. The result is that by 28th March 1977 the beneficial ownership of the 15,000,000 shares had passed from C.K. San to the Syndicate.

The price agreed between the Syndicate and the Chows for the Fermay shares (in effect for the 15,000,000 San Imperial shares, which were Fermay's only asset) was HK\$9,000,000. As already explained, only HK\$200,000 of that sum have so far been paid. The balance of HK\$8,800,000 has still to be paid to the persons entitled to receive it. The appellants did not, and could not, dispute that a consequence of the judge's finding that the Chows had been nominees of C.K. San was that the persons entitled to receive the balance of HK\$8,800,000 are C.K. San's creditors, the respondents in this appeal. Accordingly their Lordships are of opinion that a garnishee order for the HK\$8,800,000 ought to be made in favour of the respondents.

There remains the separate but related problem of the 2,164,200 shares in San Imperial which Ng claims to have bought for himself from two residents in Taiwan called Lee and Fong. Ng alleges that during his third visit to Taiwan (23rd-27th January 1977) to discuss buying the Chows' shares on behalf of the Syndicate, the Chows told him that friends of theirs had 515,000 shares in San Imperial which they were willing to dispose of. On his return to Hong Kong Ng reported this news to the other members of the Syndicate, but they were reluctant to buy these shares, mainly because they feared that the certificates for them might not be genuine. It was therefore arranged between Ng and the other members of the Syndicate that Ng could buy the shares as an individual if he wished. On his next visit to Taiwan Ng was told by the Chows, after some discussion, that Lee and Fong would sell their shares for HKc20 each, provided that he paid for 515,000 shares although in fact they had only 514,200. Ng agreed to that proposal and on his next visit a fortnight later he took the necessary money (HK\$433,000) with him to Taiwan, paid on the footing that he was receiving 515,000 shares, and received certificates for 514,200. The Chows then told him that their friends had a further 1,650,000 shares for sale and Ng agreed to buy them for himself at the same price of HKc20. He paid for them on his sixth and final visit during the period 22nd to 26th March 1977.

The certificates for the whole parcel of 2,164,200 shares turned out to be valid, and the shares were registered by Ng as beneficial owner in name of MAF Securities Limited, as his nominee, on 29th March 1977. There is no doubt that Ng paid money to the Chows which was equivalent to a price of 20 cents for 2,165,000 shares. The respondents allege that the money was not paid for the shares, but was really an advance intended to be passed on to C.K. San to put him in funds until the main negotiations on the 15,000,000 shares had been concluded. The judge doubted whether Lee and Fong existed, but he thought that, if they did, they were, like the Chows, nominees of C.K. San. With regard to the 514,200 shares he found that "there was either no acquisition [by Ng] or the purported acquisition was a sham and a nullity". He added "I have already stated that Ng's evidence is not worthy of credence". With regard to the whole 2,164,200 shares he found that "the probabilities are therefore that the Syndicate knew that [they] came into Ng's hands from C.K. San, with or without Lee and Fong as C.K. San's intermediaries or nominees". Their Lordships observe that once again the judge seems to imply that because the vendors were C.K. San's nominees the transaction was a sham and a nullity. As already noted that is an erroneous view.

The judge's conclusion on this matter was as follows:—

"In my view payment was made towards those [2,164,200] shares, but it is not possible to make a finding as to the precise purpose of such payment."

Their Lordships have some doubt as to the meaning of that conclusion. A payment "towards" those shares would normally imply that it was a part payment of the price by a purchaser. In any event it is clear, and the judge accepted, that the shares were transferred from the names of nominee companies who held them either for C.K. San or Lee and Fong into the name of another company to hold, ostensibly at least, on behalf of Ng. Having regard to that fact, and to the other established fact accepted by the judge, that Ng gave money "towards" the shares, the transaction could not be found to have been a sham without clear proof. Such proof is in their Lordships' view wholly lacking.

The judge's reasons for his conclusions were, apart from his general disbelief of Ng's evidence, two. The first was that Ng's total estate was about HK\$1.5m., and that he would have been unlikely to pay over a quarter of his fortune without knowing whether the share certificates were valid or not. Their Lordships consider that this is a very slender basis to warrant any conclusion adverse to Ng, particularly in view of the overall profit that he stood to make if the shares were genuine. He bought them at HKc20 and eventually sold them to James Coe at HK\$1.50. The profit was over HK\$2,800,000. The judge's second reason was that there was no reason why the Syndicate should have allowed Ng to pocket the whole profit on these shares. In fact, as Huggins J.A. pointed out, the reason probably was that the Syndicate were doubtful about the authenticity of the shares. In any event, the judge's reason again does not impress their Lordships as being substantial. Not only is there a lack of positive evidence to support the respondents' allegations on this part of the case, but they were never clearly put to Ng in cross-examination. In particular, it was not suggested to him that the payment was an advance to C.K. San or that Lee and Fong did not exist. The only point that has caused their Lordships some doubt as to the genuineness of Ng's acquisition of these shares is that when he received the certificates and transfers for the 514,200 shares he did not immediately present them to the Registrar of San Imperial for registration, to establish their validity. He gave no satisfactory explanation for the delay in presenting them, but the unexplained delay is not sufficient to upset the genuineness of the transaction.

For all these reasons their Lordships are of the opinion that it has not been proved that Ng's purchase of these shares was other than a genuine acquisition of the beneficial interest in the shares. The conclusion upon this part of the case tends to support the conclusion as to the 15,000,000 shares already considered.

The first appellant is, in their Lordship's view, entitled to have the sum of HK\$2,813,300, which he paid to the third respondent in obedience to the order of the Court of Appeal, repaid to him.

On the case as a whole their Lordships have reached the opinion that the learned judge was well founded in his finding that the respondents had failed to prove any conspiracy on the part of the Syndicate. Their Lordships' reasons may be summarised as follows. First, the probabilities seem to be in favour of the appellants' contention that the Syndicate bought the 15,000,000 shares and Ng bought the 2,164,200 shares with a view to re-selling them at a profit. That is, on the face of things, what they did. If the whole operation was a device to protect C.K. San it was an extremely elaborate one involving the acquisition of several different parcels of shares at different prices from apparently different sources. Counsel for the respondents in his concluding address to the Board submitted that nearly all the shares came originally from C.K. San himself, but, even so, the evidence does not in their Lordships' opinion establish that he remained the beneficial owner of the two parcels of shares with which this appeal is concerned. It must be remembered that the members of the Syndicate were, so far as appears from

the evidence, reputable people of good standing in the legal, business and stock exchange community in Hong Kong. It would be highly improbable that they would lend themselves to a scheme, on behalf of C.K. San, to defraud his creditors, in return for some remuneration or commission which was hinted at in argument, but never stated in evidence. It is surely much more probable that, after the initial approach by James Coe, they would carry out the (very profitable) operation which they claim to have done. The case for the respondents appears to their Lordships to be built upon suspicion, unsubstantiated by evidence, and strikingly contrary to the probabilities.

Secondly, if the whole operation was intended to protect C.K. San, there would have been every reason for proceeding with it urgently. The long period of three months from 31st December 1976 to 23rd March 1977 occupied by the negotiations between Ng and the Chows suggests strongly that the negotiations were genuine. Whether the Chows were principals or agents does not affect this point. If C.K. San had been retaining the beneficial interest in the shares and the negotiations had been merely a sham it would not have mattered what price was fixed for the shares and it seems highly unlikely that the negotiations would have lasted so long. Thirdly, no sufficient positive evidence has been shown to their Lordships to support the case of sham.

Their Lordships have therefore reached the conclusion that the orders of the Court of Appeal dated 22nd March 1979 cannot, save insofar as those orders properly discharged or varied certain of the earlier orders of Yang J., be supported. Their Lordships will therefore humbly advise Her Majesty accordingly. The appellants must have the costs of the appeal to the Court of Appeal and to this Board. There will be no order for costs of the trial before the learned judge having regard to the large proportion of the time that was occupied by the unsuccessful arguments on behalf of the appellants to the effect that the Chows and Lee and Fong were acting as principals.





In the Privy Council

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DAVID NG PAK SHING  
AND OTHERS

v.

LEE ING CHEE,  
also known as  
LEE HAI HOOK,  
AND OTHERS

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DELIVERED BY  
LORD FRASER OF TULLYBELTON